



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-07-1

INTRODUCTION

The Town of Barnstable (Town) operates four public marinas where it leases boat slips or berths to the public. To obtain a slip or berth at the Town-owned marinas, a boat owner must complete an Application for Berth and comply with various terms and conditions. The Town also regulates waterway areas in which are located numerous moorings. To obtain permission to place a mooring in one of those areas, a boat owner must complete an Application for Mooring and comply with Town regulations.

The Town Manager had intended to apply for a Town boat slip, but has since decided to withdraw his application. Meanwhile, members of the Town's Waterways Committee might apply for boat slips or moorings. It is also likely that, according to the Town's municipal counsel, other Town employees may apply for Town boat slips or moorings.

QUESTIONS

1. Does the lease of a berth involve a contract for purposes of G. L. c. 268A, § 20?
2. Does a mooring permit involve a contract for purposes of G. L. c. 268A, § 20?

ANSWERS

1. Yes. A municipal employee who leases a berth from the Town must qualify for an exemption under § 20.
2. No.

FACTS

The Town owns and operates four public marinas with a total of 183 boat slips or berths.^{1/} In addition, there are 2,397 permitted moorings in Town waters.^{2/} Because demand far exceeds supply, there is a waiting list of 114 for Town boat slips and another waiting list of 1,315 for moorings in Town waters. According to its municipal counsel, the Town has some of the most exclusive (and expensive) private marinas in the Commonwealth. Public facilities, therefore, offer more affordable options for Town residents.

Under Town law,^{3/} the Town Manager is responsible for the rental, use, maintenance, and repair of all Town facilities. The Marine and Environmental Affairs Division (Division), within which the Harbormaster operates, is responsible for enforcement and promulgation of mooring regulations, marina rules and regulations.

The Harbormaster approves moorings, slip contracts, and supervises the four Town marinas. Further, he supervises the collection of fees and charges at the various marinas,

ramps, and the fees for mooring permits. Under G. L. c. 91, § 10A, the Harbormaster has jurisdiction over the permitting and placement of floats held by bottom anchors, which, by extension, gives the Harbormaster jurisdiction over the permitting of recreational moorings.^{4/}

The Town has also established a Waterways Committee, among whose assigned authorities and responsibilities is to recommend, to the Town Manager, the promulgation of rules, regulations, and fees to be charged for the use of Town-owned waterfront piers, bulkheads, slips, and marinas. In addition, the Waterways Committee studies, plans, and makes recommendations regarding the development, protection, maintenance, and improvements of wharves, bulkheads, docks, piers, slips, marinas, Town landings, launching ramps, and other marine improvements of interest to the Town. As described further below, the Waterways Committee can hear appeals concerning mooring permits.

The Waterways Committee consists of the Town Manager or his designee, the Harbormaster, and three resident taxpayers appointed by the Town Council for three-year terms.

Berth

As part of the Town's management of its marinas, the Town has issued the "Town of Barnstable Marina Rules and Regulations" (Marina Regulations) and "Application for Berth Town of Barnstable" form (Application for Berth). A boat owner must complete the Application for Berth, under the pains and penalties of perjury, and comply with the Marina Regulations in order have his boat tied up at a Town slip. The Application for Berth states, among other things,

Any interpretation of these regulations by the Town, or agents of the Town, shall be made with the basic premise that a slip is to be used for the personal and sole use of the slipholder and that the rental value of the slips themselves is an asset of the Town that must not be diverted to private parties. Therefore, the slipholder hereby agrees that any deviation from this premise by the slipholder shall result in the termination of any slip rental agreement and further, the Town may recover any amounts received by the slipholder from other parties which are essentially in the nature of payment for the use of the slip.^{5/}

The Marina Regulations contain a schedule that specifies the rental rates at the various marinas. If a slipholder does not comply with the Marina Regulations, the Town may require the slipholder to "prove to the satisfaction of the Town" that he is not in violation. If the slipholder does not respond within two weeks of such a request, the slipholder "shall relinquish the rights to the slip and all fees be forfeited to the Town." Further, if there are violations, the Town may remove "the vessel to a place away from the slip, such as a mooring, other anchorage, or dry storage" and the slipholder is required to "indemnify and hold the Town, and its agents, harmless for any damage to his vessel or for the cost of towage or storage."

Finally, the Application for Berth contains a seal, which states, "Approval of This Application By the Town Shall Constitute Creation of a Contract, Under Seal."

Mooring Permit

There are seventeen areas subject to the Town's jurisdiction where moorings may be placed. To obtain permission to moor one's boat in any of those areas, one must first complete the Town's "Application for Mooring Permit" (Application for Mooring).

An applicant must pay a fee of \$70, by check or money order, made payable to the Town. The Application for Mooring states:

THE TOWN OF BARNSTABLE ASSUMES NO RESPONSIBILITY FOR THE SAFETY OF THE VESSEL MOORED ON THE MOORING AND WILL NOT BE LIABLE FOR FIRE, THEFT, OR DAMAGE TO SAID VESSEL AND/OR MOORING, ITS EQUIPMENT OR ANY PROPERTY IN OR ON SAID VESSEL. THE MOORING OWNER AGREES THAT THE MOORING OF ANY VESSEL SHALL BE AT HIS/HER OWN RISK, HAS READ AND WILL COMPLY WITH ALL MOORING REGULATIONS OF THE TOWN OF BARNSTABLE.

IT IS THE RESPONSIBILITY OF THE INDIVIDUAL TO PERIODICALLY INSPECT ALL CHAFING GEAR ON THE MOORING PENNANTS TO ENSURE PROTECTION THROUGHOUT THE SEASON. THE TOWN OF BARNSTABLE WILL NOT BE RESPONSIBLE FOR THE VESSEL GOING ADRIFT, AGROUND, OR DAMAGING ANOTHER VESSEL OR PROPERTY.^{6/}

“Mooring Permit Holder[s],” are obligated to ensure that their moorings obtain full inspections. Failure to do so can result in the termination of the mooring permit. The Application states, “If all information is correct and complete, the permit will be issued.”

The Town has also issued “Mooring Regulations” (Mooring Regulations) which were promulgated under the authority of G. L. c. 91. The Mooring Regulations specify, in detail, the requirements for the mooring anchor and chain (or tackle).

The Mooring Regulations specify that inspections must be done by either the Harbormasters Office or a mooring servicer. Each existing mooring must be inspected, out of the water, every three years. The expense of this inspection is borne by the owner.^{7/}

The Mooring Regulations state that moorings “shall not be placed, altered, shifted or interfered with except under the direction of the Harbormasters Office.” Placements within the areas are based on the size of the boat and its proximity to other moorings in the area. The Harbormaster may require a mooring to be relocated, but the relocation expense is the owner’s responsibility. The Harbormaster may limit the size and lengths of boats moored in Town waters if, in his opinion, there are issues of public safety, congestion, or navigation. Further, the Harbormaster may suspend or revoke a permit if the boat and/or mooring unduly threaten the mooring area or the reasonable use of that area by other boats. Moorings placed in a location other than as permitted by the Harbormaster “shall be grounds for revocation of the mooring permit.”^{8/}

Finally, “a harbor master may, at the expense of [the owner], cause the removal of any vessel which lies in his harbor and is not moved when directed by him, and upon the neglect or refusal of [the owner] on demand to pay such expense, he may recover the same from [the owner] in contract, to the use of the town where the harbor is situated.”^{9/}

The Mooring Regulations provide an appeals process. “Any person aggrieved by a refusal to permit a mooring, or any condition or restriction imposed relative thereto, may appeal without prejudice, waiver or stay of any other appeals in writing” to the Town’s Waterways Committee, within fifteen days after receiving notice.^{10/} In addition, there is a further appeals process under G. L. c. 91, § 10A to the Division of Waterways of the Department of Environmental Protection.

DISCUSSION

Section 20 of G. L. c. 268A prohibits a municipal employee^{11/} from having, in addition to his municipal employee position, a direct or indirect financial interest in “a contract made by a municipal agency” of his municipality, unless he qualifies for an exemption specified in the statute. The issues are: (1) whether the Application for Berth and the Town’s approval to use a berth constitutes a municipal contract for the purposes of § 20 and (2) whether the Application for Mooring and the ensuing permit constitutes a municipal contract.

Berth

The Application for Berth and the Town’s acceptance of the Application constitute a contract. The elements of a contract, as we recently reiterated,^{12/} exist in this transaction. The Application for Berth involves the lease of a specific Town-controlled space, along with rights to use Town property and services at the piers or wharves. Most notably, the Application for Berth states that approval of the Application “shall constitute creation of a contract, under seal.” It is clear that the Town has decided to treat the transaction as a contract.

Accordingly, if a municipal employee of the Town wishes to make an Application for Berth and his Application is approved, he will also need to comply with § 20.^{13/} Generally, a municipal employee may comply with § 20 by qualifying for one of the exemptions in the statute.

For members of the Waterways Committee, the easiest way to comply would be to have the Town Council designate the positions on the Waterways Committee as “special municipal employees.” Next, if a member of the Waterways Committee wished also to rent a Town boat slip, he must qualify for the § 20(d) exemption. This exemption requires the special municipal employee to obtain the approval of the Town Council and to file a disclosure with the Town Clerk, fully describing his financial interest in the contract.^{14/}

For municipal employees whose positions cannot qualify for special municipal employee status, then the only exemption available to them to lease a Town berth is § 20(b).^{15/} However, given the public process for the contract, municipal employees who do not work for the Harbormaster, or a Town agency that regulates the activities of the Harbormaster, and who, through their Town jobs, neither participate^{16/} in nor have official responsibility^{17/} for any activities of the Harbormaster, will be able to qualify for the § 20(b) exemption by filing the required disclosure of financial interest.^{18/}

Mooring Permit

The next issue is whether the Application for Mooring Permit and the issuance of a permit by the Town constitute a contract for purposes of § 20. For the following reasons, we conclude that it does not.

First, we acknowledge that the term “permit” has a common meaning that is generally different from “contract.” It is commonly defined as “a written warrant or license granted by one having authority”^{19/} or “a certificate evidencing permission; a license.”^{20/} The term “permit” does not have a singular definition in the General Laws.^{21/} It, however, has been applied in numerous contexts involving the regulation of resources.^{22/}

Further, there are differences between the rights and obligations afforded to parties to a contract and the rights and obligations imposed on parties to a permit. Generally, licenses or permits are privileges or permissions rather than contracts or property rights.^{23/} The Town has created contractual rights for the berth user and the Town while, under the Town's regulatory process created pursuant to G. L. c. 91, the mooring permit holder is afforded appeal rights, as an aggrieved party, that do not create claims based on contract.^{24/}

Unlike the Application for Berth discussed above, the Application for Mooring does not involve allocating a specific Town-controlled space in the waterways but, rather, involves a more general area in which one has permission to "park" one's boat. The Town incurs several obligations to the benefit of the boat owner under the Application for Berth while, under the Application for Mooring, the Town has allocated to the boat owner nearly all the obligations and risks associated with anchoring a boat in Town waters. When the Town gives permission to moor under the Application for Mooring, the Town does not incur further obligations on behalf of the Town for the benefit of the boat owner.

For all the foregoing reasons, we conclude that § 20 does not apply to a municipal employee who completes an Application for Mooring Permit and obtains a Mooring Permit.

DATE AUTHORIZED: March 14, 2007

¹ A slip or a berth is a space, in tidal waters, next to wharves or floating piers owned by the Town where a boat can tie up. Among other conveniences, such as having direct access to electricity or fresh water, a slip or berth in a marina allows boat owners to walk to their boats.

² Moorings anchor a boat in a harbor area offshore.

³ Section 4-3(g) of the Town's Charter.

⁴ Chapter 91: Section 10A. Temporary moorings of floats or rafts; permits, issuance or refusal; review; public nuisances

Section 10A. Notwithstanding any contrary provision of law, the harbormaster of a city or town or whomsoever is so empowered by said city or town may authorize by permit the mooring on a temporary basis of floats or rafts held by anchors or bottom moorings within the territorial jurisdiction of such city or town upon such terms, conditions and restrictions as he shall deem necessary. He shall act on applications for such permits within a period of fifteen days from receipt thereof.

A reasonable fee for such mooring, proportionate to the city or town's cost of overseeing mooring permit, may be imposed by the city or town or whoever is so authorized by the city or town, provided, however, that no such mooring fees may discriminate on the basis of residence; and provided further, that any mooring fee collected shall be deposited into and used in accordance with the purposes of the Municipal Waterways Improvement and Maintenance Fund, pursuant section 5G of chapter 40.

Any person aggrieved by a refusal to permit such temporary mooring, or by any condition or restriction imposed relative to such mooring, may appeal to the division of waterways of the department within thirty days after receiving notice of such refusal or of the imposition of such condition or restriction.

Said division shall review the circumstances resulting in such appeal and shall render a ruling either confirming the action of a harbormaster, setting such action aside, or amending such action and imposing its own conditions and restrictions as deemed necessary.

Nothing in this section shall be construed as authorizing the placement of floats or rafts and appurtenant anchors or bottom moorings on private flats of other than the applicant if objected to by the owner or owners thereof.

Actions by a harbor master and/or the division under this section shall be subject to applicable laws administered by the division of motor boats, the division of marine fisheries, the United States Coast Guard and the United States Corps of Engineers.

Floats or rafts held by anchors or bottom moorings installed without permission from a harbor master and/or said division shall be considered a public nuisance and may be removed by the harbor master at the expense of the owner in the event he fails to remove same after notice in writing from the harbor master.

For the purpose of this section, temporary shall mean for no longer than to the end of any given calendar year.

⁵ The Marina Regulations also echo these points, “[T]he slipholder hereby agrees that any deviation from this premise by the slipholder shall result in the termination of any slip rental agreement and further, the Town may recover any amounts received by the slipholder from other parties which are essentially in the nature of payment for the use of the slip.”

⁶ Emphasis in original.

⁷ According to the Town’s municipal counsel, the Town does not sell or lease any of the equipment needed to moor a boat under the Mooring Regulations. Nearly all inspections of the moorings are done privately. In some cases, however, an applicant who has a small boat may bring the anchor and mooring chain/tackle to the Harbor master, and he inspects the gear.

⁸ Mooring Regulations, § 406-7.

⁹ G. L. c. 102, § 24.

¹⁰ Mooring Regulations, § 406-22.

¹¹ “Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis” G. L. c. 268A, § 1(g).

¹² *EC-COI-06-1*.

¹³ Municipal employees also have the option of resigning from their municipal positions in order to retain their financial interest in the relevant contract. In addition, although issues under §§ 17, 19, and 23 were not presented in this request, we acknowledge that the circumstances in which marina or mooring opportunities may become available can raise issues under these sections as well. Municipal employees must, of course, also comply with other applicable sections of G. L. c. 268A if they want to obtain a slip or mooring.

Municipal counsel has suggested that we also consider that the types of contracts for boat slips are not the types of “contracts” § 20 is intended to cover because these contracts do not implicate “secret dealings, influence peddling and other activities where the employee is confronted with a conflict of interest.” *Quinn v. State Ethics Commission*, 401 Mass. 210, 220 (1987). He has stated that the processes for both boat slips and moorings are open and fair, regardless of applicant.

However, the Legislature has expressly included, rather than excluded, in § 20 contracts subject to public processes. For example, to be eligible for a § 20(b) exemption, “the contract is made after public notice or where applicable, through competitive bidding.” Further, whether the municipal official actually did an improper act, or acted “above board,” in order to enter into the relevant contract, are **not** elements of a § 20 violation. We presume that a contract “made after public notice or . . . through competitive bidding” is open and fair. If a municipal official has a financial interest in contract, in addition to his municipal employee position, he is in violation of § 20, unless he qualifies for a statutory exemption.

In general, the exemptions in § 20 address the potential for secret dealings and influence peddling by making it difficult for those municipal officials who have some type of official role over the “contracting agency” also to have financial interests in contracts with the “contracting agency.”

Moreover, given the reported demand/waiting lists for Town slips, which, as counsel has stated, are much more affordable than private marina spaces, it is difficult to consider the financial interests in the Town marina contracts as *de minimus*.

¹⁴ If a special municipal employee either participates in, or has official responsibility for, any of the activities of the “contracting agency,” he must obtain an exemption under § 20(d). Other special municipal employees, who neither participate in or have official responsibilities for the contracting agency could comply with § 20 by filing a disclosure under § 20(c).

¹⁵ We note that § 20 would not prohibit the Town from, for example, including the use of a boat slip as part of a municipal employee’s contractual benefits.

¹⁶ “Participate, participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” G. L. c. 268A, § 1(j).

¹⁷ “Official responsibility, the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.” G. L. c. 268A, § 1(i).

¹⁸ Section 20(b), in these circumstances, is available “to a municipal employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family.” G. L. c. 268A, § 20(b).

¹⁹ Webster’s Third New International Dictionary (1993).

²⁰ Black’s Law Dictionary, 7th Ed.

²¹ G. L. c. 4, § 7.

²² See e.g., G. L. c. 130, § 75; G. L. c. 111, § 31A; G. L. c. 114, § 46; G. L. c. 40A, § 11.

²³ *Young v. Blaisdell*, 138 Mass. 344, 345 (1885) (“It has been held, too often to be now open to question, that our statutes regulating the manufacture and sale of intoxicating liquors are laws, in the nature of police regulations, necessary for the general benefit; and that, although they impose restrictions upon the use of property . . . they are constitutional. . . . A license granted under this statute is in no sense a contract or property. It is a mere permission or authority to the licensee to sell according to law.”); *Morley v. Police Comm’r of Boston*, 261 Mass. 269, 277 (1927) (licenses issued by the City of Boston that required taxis to use designated taxi stands are privileges or permissions “and in no sense a contract or property”); *Higgins v. Board of License Comm’rs of City of Quincy*, 308 Mass. 142, 144 (1941) (license authorizing use of building to sell gasoline and other similar products is not a contract but is the means adopted to carry out police power for public safety).

²⁴ We note that G. L. c. 102, § 24, described above, expressly gives contractual rights to a harbormaster, in certain circumstances. But that statute does not provide contractual rights to a boat owner. In addition to powers granted by the Legislature under G. L. c. 91, § 10A, there may also be common-law support for a municipality having some authority over waterways based on municipal police powers. For example, a municipality’s grant of “liberty to wharf . . . might be in the nature of a mere police regulation” and such a “grant from a subordinate [municipal] authority, which is not shown to have the title . . . amounts to . . . mere permission.” *Boston v. Richardson*, 105 Mass. 351, 363 (1870) (property dispute as to who had title to an area between the high water mark and low water mark); *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194, 207, n. 19 (2000).